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Freedom in Serving Others: Arguments and Sources for Religious Institutional Freedom

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ARTICLE

FREEDOM IN SERVING OTHERS: ARGUMENTS AND SOURCES FOR RELIGIOUS INSTITUTIONAL FREEDOM

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Some of the most contested questions in the law of religious freedom involve freedom for nonprofit organizations that provide educational or social services to others: that is, not solely to members of their own faith. This article discusses why organizational freedom in those instances is important. Consider these cases:

- The city of Philadelphia terminated its contract with a Catholic foster-care agency for the placement of foster children of varying faiths, on the ground that the agency would decline to certify same-sex couples as qualified foster parents. But the U.S. Supreme Court held that the city had to recognize a religious-freedom exception to its nondiscrimination rule when it already recognized discretionary exceptions from the rule in other circumstances.[1]
- In 2020, the Court ruled that Catholic K-12 schools, which serve students of varying faiths, cannot constitutionally be sued for discrimination for the choices they make in selecting or evaluating teachers who teach religious doctrine.[2]
- The nine-year-long dispute over the Affordable Care Act contraception mandate, which has generated intense public division and three Supreme Court decisions, began when the federal government required employers to cover employees' contraception and initially declined to exempt religious nonprofit institutions that served or employed non-members.[3] The

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1. Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

2. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

3. *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2374 (2020) (quoting this initial exemption and noting its "narrow focus on churches" as opposed to nonprofit service organizations).

government subsequently gave a distinct accommodation to religious nonprofits, but that protection did not resolve the issue.[4]

- Such issues arise for progressive as well as conservative religious entities. For example, the group No Más Muertes (No More Deaths) and its members are driven by religious conscience to provide food and water to immigrants who have entered the country illegally but are now vulnerable as they travel. A defendant prosecuted for giving such assistance has successfully raised a defense under the Religious Freedom Restoration Act of 1993 (RFRA).[5]

Faith-based nonprofits that reach out to provide educational or social services to the broader public raise contested questions because they "straddle the perceived boundary of the public versus private."[6] Some claims of freedom for religious institutions command strong consensus because they implicate matters widely seen as private, involving ministry to the faithful, not to the general public. Freedom for houses of worship or for decisions about clergy fall into that category. Conversely, some religious institutions serve the public with no conflicts between their own norms and the requirements of law. Their tenets tend to follow those of the general culture, so they seldom clash with the law.

But institutions will tend to face religious freedom issues when they employ or serve people outside their faith and also have tenets that clash with general laws, whether on immigration, nondiscrimination, or other matters. I have called such institutions "partly acculturated" because they combine service to the broader culture with religious tenets that the majority rejects.[7] These institutions face assertions that because they engage the broader society, they lose any religious-freedom defense against laws that clash with their religious tenets, no matter how serious the burden on their exercise of religion.

To take one example of such assertions, a pair of prominent critics of exemptions from the contraception mandate argued that such exemptions created an unconstitutional harm to employees whenever the employer "hire[d] from the general pool of applicants, rather than exclusively from a

4. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 698–99 (2014) (describing the original exemption and the nonprofit accommodation); subsequent decisions concerning the accommodation are Zubik v. Burwell, 578 U.S. 403 (2016); and *Little Sisters of the Poor Saints Peter & Paul Home,* 140 S. Ct. at 2367.

5. United States v. Hoffman, 436 F. Supp. 3d 1272, 1279–89 (D. Ariz. 2020). *But cf.* United States v. Warren, No. MJ-17-0341-TUC-BPV, 2018 WL 6809430, at *2 (D. Ariz. Dec. 27, 2018) (refusing RFRA defense, at preliminary stage, on ground that defendant had not shown he was "compelled . . . to do anything in violation of his religious beliefs").

6. Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits*, 91 Notre Dame L. Rev. 1341, 1341 (2016) [hereinafter *Partly Acculturated*].

7. *Id.*

specific religious group."[8] The employer's objections should be rejected if it employs "nonadherents or adherents who understand the requirements of the affiliated religion differently."[9] Another critic argued that an exemption for anything more than the narrow category of religious congregations and denominations—that is, an exemption for religious schools and social services—would illegally "foist[ ] the Catholic Bishops' religious views onto employees, whether or not they are Catholic."[10]

This paper defends freedom for those institutions: it defends the proposition that religious freedom includes *freedom in serving others.* The law should not force institutions to be either wholly unacculturated, serving only their own members, or wholly acculturated, subject to all regulations however serious those regulations clash with the institution's animating beliefs. Part I makes that case, arguing that freedom in serving others (1) flows from the equality of different religious freedom claims and (2) contributes to the common good. Part II then examines sources of American law that protect institutional religious freedom. That protection cannot be absolute for all institutional claims, of course. A system of ordered liberty entails that even fundamental freedoms have boundaries set by the interests of other persons and of society. But we can draw sensible yet protective lines, and Part III offers suggestions for doing so.

I. The Case for Freedom in Serving Others

A. *Institutional Religious Freedom*

Religious freedom certainly protects individuals in their conscience, commitment, and identity. But it also protects religious institutions and communities; a vigorous conception of religious freedom must also protect them vigorously. Long ago, the Supreme Court said that "[t]he right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned."[11] Recently the Court has reemphasized, in lopsided majorities, that institutions have rights to choose their religious leaders and to decide other matters of "internal governance" that "affect[ ] [their] faith and mission."[12]

8. Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L. L. Rev. 343, 381 (2014).

9. *Id.*

10. Caroline Mala Corbin, *The Contraception Mandate*, 107 Nw. U. L. Rev. 1469, 1482 (2013).

11. Watson v. Jones, 80 U.S. 679, 728–29 (1871).

12. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–89 (2012) (9-0 vote affirming the right to choose ministers); *See* Our Lady of Guadalupe Sch. v.

Historical and theoretical arguments have grounded institutional religious freedom. It is worth giving a brief—far from exhaustive—explication of those arguments and discussion of common counterarguments.

1. Institutions and Persons

A first argument for institutions' religious freedom is that they serve as vital means for individual persons to exercise their religion. Even if religion is conceived as ultimately a decision or practice of individuals, institutions are crucial. In the words of Justice William Brennan, a staunch defender of individual freedom:

> Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] [C]lause." . . . For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.[13]

For these reasons, Brennan said, religious institutions must have rights to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions."[14] He articulated this in joining another unanimous decision recognizing the importance of institutional freedom.[15] As scholars like Rick Garnett and Paul Horwitz have emphasized, religious institutions are key components in the "infrastructure" of people's religious exercise.[16] They play much the same role that media enti-

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Morrissey-Berru, 140 S. Ct. 2049, 2061 (2020) (7-2 vote affirming the right to choose religious teachers as an aspect of "independence in matters of faith and doctrine and in closely linked matters of internal government"); Similar decisions over the years include, *e.g.,* Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich, 426 U.S. 696 (1976); and Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94 (1952).

13. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 341–42 (1987) (Brennan, J., concurring in the judgment) (footnote omitted) (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations & the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981)).

14. *Id.* at 341 (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations & the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981)).

15. *See id.* at 327 (upholding statutory exemption allowing religious nonprofits to hire and fire based on employees' religion).

16. Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 273–76 (2008).

ties or universities play in people's practical exercise of speech, or that political parties play in people's exercise of political activity.[17]

A law imposes a significant burden on individual religious exercise if it pressures religious institutions to withdraw from some aspect of their mission, to disregard their religious norms in pursuing the mission, or to refrain from applying religious standards to those who carry out the mission. Such burdens restrict many persons from exercising religion through the institution. Those persons include other employees of the institution, donors who want to give to such an institution, and people who want to receive services from it. Think, for example, of families that wish to send their children to a school with vigorous religious norms, or families that wish to work with an adoption or foster-care agency that remains aligned with the Catholic Church and therefore adheres to the Church's teachings on sex or family matters.

In counter to this point, it's often asserted that protecting the freedom of religious institutions to act against an individual employee interferes with such individuals' freedom to exercise religion themselves.[18] The institution assertedly hampers the religious exercise of employees and clients by applying its rules to them: to the minister or other employee who is fired from their position, to the same-sex couple whom a religious foster-care agency declines to certify, and so forth. But as just noted, barring the institution from following its rules hampers the religious exercise of many other individuals: donors, other employees, other clients. In balancing those effects, we should recognize a presumptive difference between burdens imposed by the law and those imposed by a private religious entity.

A legal mandate usually leaves the institution no alternative but to comply. It results in an injunction, or in damage awards or other penalties that mount with every action violating the law. But a private entity lacks power to impose such effects. The limits on its power open up opportunities for alternative means of protecting employees and clients who are negatively affected by the institution's rules. Such means can be "less restrictive" of the institution's religious exercise, to use the language of constitutional caselaw and religious-freedom statutes.[19]

17. PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 174–93 (2013); Garnett, *supra* note 16.

18. *See, e.g.*, Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1091 (1996) ("[I]ndividual free exercise rights are jeopardized when the government excludes religious employees from protections it offers to other employees. Such exclusion places an unwarranted burden on individuals' choice to take religious jobs, and may encourage those who choose a religious vocation to change faiths."); Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 391–442 (1987).

19. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 404 (1963); Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(b) (1993), *invalidated* by City of Boerne v. Flores, 521 U.S. 507 (1997).

The means for mitigating effects on clients or employees include turning to alternative providers in a diverse, pluralistic market. A minister rejected by one congregation or denomination can seek to work in another. Same-sex couples can typically go to many nonprofit entities that are glad to serve them; LGBTQ students choosing colleges have a wide range of public and private options whose number generally dwarfs the number of religious colleges with traditionalist sexual tenets. That's not to say that religious freedom equates with a general libertarianism in opposition to nondiscrimination and other employment laws. There are powerful reasons to have laws generally prohibiting invidious discrimination or protecting important interests of employees.[20] Markets are simply one factor—but an important factor—that allows protection of the fundamental civil right of religious freedom against government interference while mitigating the effect of that protection on the civil rights of others.

Government can also adopt specific mechanisms for mitigating such effects. For example, the Obama administration ultimately accommodated religious nonprofits' objections to insuring contraception by shifting the coverage duty to the entities' insurance companies or a third-party administrator.[21] Contraception, or other benefits, can also be provided by government from general tax revenues, rather than by objecting employers under legal coercion.

2. Institutions as Counterweights

Some recent defenses of institutional religious freedom have excavated its roots in Western history from as deep as the Middle Ages. In the investiture controversy of the eleventh and twelfth centuries, popes and monarchs fought over their respective powers—including, but not limited to, the question of which of them would have the authority to appoint Catholic bishops. Both on the continent and in England, the eventual compromise (roughly) guaranteed the church the authority to elect bishops and abbots, even though the monarch retained the authority to invest them with their rights of temporal property. I and others have summarized the consequences this resolution had for freedom, quoting the eminent historian Brian Tierney:

> Because each side in these disputes prevailed only in a limited area— popes over spiritual offices, kings over temporal matters— the result was a "duality" of jurisdictions that "profoundly influenced the development of Western constitutionalism." As a leading authority on the controversy has written, "The very existence

20. *See* Thomas C. Berg, *Religious Accommodation & the Welfare State*, 38 HARV. J.L. & GENDER 103, 149–51 (2015).

21. Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39870-71 (July 2, 2013) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pts. 2510 & 2590, 45 C.F.R. pts. 147 & 156) (discussed in Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2375 (2020))[hereinafter *Nonprofit Accommodation*].

> of two power structures competing for men's allegiance instead of only one compelling obedience greatly enhanced the possibilities for human freedom."[22]

Later pre-modern church-state arrangements redrew the line; the Church of England was a national church headed by the monarch who also appointed bishops. But the American founders, by rejecting established churches and guaranteeing free exercise to all, "ensured that the new Federal Government—unlike the English crown—would have no role in filling ecclesiastical offices."[23]

Some scholars have criticized the effort to draw lessons from the medieval settlement for church-state relations in "our modern, post-Enlightenment, democratic society."[24] They point out that medieval popes saw the Catholic Church as the sole legitimate competitor to the civil authority, and in fact as superior to it; under that vision, popes should, and did, wield secular authority as well as religious authority.[25] Granted. But scholars who see contemporary relevance in the medieval church-state conflict think that the relevance lies not in the Church's unqualified claims, but rather in the key aspects of the settlement. "Although Gregory VII asserted broad papal supremacy over civil rulers, what he secured was 'the independence of the clergy from secular control' in ecclesiastical matters like clergy selection."[26] That independence can exist for a variety of organizations, not just for one.

Historical church-state struggles like the investiture controversy matter not because they dictate results today. They matter because they relate to another purpose of religious freedom: preserving religion's ability to serve as a counter to the state's power of controlling behavior and defining meaning. In Stephen Carter's words, "Religions are in effect independent centers of power, with bona fide claims on the allegiance of their members. . . . A religion speaks to its members in a voice different from that of the state" and so "act[s] as a counterweight to the authority of the state."[27] Religious

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22. Thomas C. Berg, Kimberlee Wood Colby, Carl H. Esbeck & Richard W. Garnett, *Religious Freedom, Church-State Separation, & the Ministerial Exception*, 106 NW. U. L. REV. 175, 180 (2011) (quoting BRIAN TIERNEY, THE CRISIS OF CHURCH & STATE 1050–1300 2 (U. Toronto Press, 1988)); *see also* HAROLD J. BERMAN, LAW AND REVOLUTION, THE FORMATION OF THE WESTERN LEGAL TRADITION (Harv. U. Press, 1983); Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59 (2007).

23. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 184 (2012); Berg et al., *supra* note 22, at 182–85.

24. Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 935 (2013).

25. *See, e.g.*, *id.* at 935–39; Frederick Mark Gedicks, *True Lies: Canossa as Myth*, 21 J. CONTEMP. LEGAL ISSUES 133, 135–36 (2013); *cf.* Paul Horwitz, *Freedom of the Church Without Romance: The Freedom of the Church in the Modern Era*, 21 J. CONTEMP. LEGAL ISSUES 59 (2013).

26. Berg et al., *supra* note 22, at 180 (quoting BERMAN, *supra* note 22, at 87).

27. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW & POLITICS TRIVIALIZE RELIGIOUS DEVOTION 35 (Basic Books, 1993).

institutions are not the only category of intermediate associations that can limit the state's claims and serve as counterweight to its pressures, but they are a particularly important and enduring category.

But the state's powers are potentially massive. To serve as a meaningful counterweight to it, religious identity must be embodied in institutions—entities that have their own institutional weight. The solitary dissenter might secure tolerance or exemption in the face of state policies. But in the long run, dissent and pluralism requires groups with meaningful organization—first, to preserve, teach, and spread dissenting ideas, and second, to create movements large enough to challenge and influence the state.

The same point has been made prominently with respect to the press as an institutional counterweight to government. Justice Potter Stewart explained the role played by a free press above and beyond allowing individuals to express dissent. "[T]he free press meant organized, expert scrutiny of government. The press was a conspiracy of the intellect, with the courage of numbers."[28] Because this institutional strength created a "formidable check on official power," "the American founders decided to risk" protecting it despite the possibility that the institutional press could abuse its strength.[29] So too with religious institutions. They give religious dissent "the courage of numbers."[30]

Unlimited freedom for religious institutions would obviously create too much opportunity for abuse of their power, for undermining the social order and the necessary functions of government. But no serious judge, advocate, or commentator calls for unlimited freedom. Under U.S. constitutional law, religious institutions have unqualified rights in only one category: matters of "internal government" like the development of their doctrine and the evaluation and selection of their "ministers" or religious leaders.[31] The domain of unqualified rights is limited, and courts define its boundaries. Outside that domain, courts and legislatures weigh institutional freedom against other interests, either case by case or through categorical judgments. The weight given to institutional freedom should be strong, but it cannot be unlimited.

B. Serving Others as Core Religious Exercise

If one point should command consensus, it is that service to others is a core aspect of religious exercise. Nearly every significant faith in America conducts social or educational services, often through congregations but also through institutions that are legally separate from the congregation but still grounded in the faith. Groups with certain "conservative" or "tradi-

28. Potter Stewart, "*Or of the Press,*" 26 HASTINGS L.J. 631, 634 (1975).

29. *Id.*

30. *Id.*

31. *See infra* Part II-A (discussing the "ministerial exception" from nondiscrimination laws and other aspects of autonomy over internal governance).

tional" beliefs are deeply involved in service. Among the four largest providers of domestic social services in America, one is evangelical Protestant (the Salvation Army); the other is Catholic Charities USA.[32] Evangelical Protestant groups also lead in prison ministries, international relief, and many other fields.[33] Religious progressives of all faiths are, if anything, even more defined by their emphasis on serving others: multiple surveys show that they "[give] the greatest priority to what have been called 'social justice' questions such as poverty and peace."[34] During his first presidential campaign, Barack Obama gave a widely noted speech commending the

> millions of Americans who share [a service-based] view of their faith, who feel they have an obligation to help others. . . . [W]hile these groups are often made up of folks who've come together around a common faith, they're usually working to help people of all faiths or of no faith at all.[35]

Liberals generally praise religious groups with an ecumenical attitude of serving those outside the faith.

It was ironic, therefore, when President Obama's own administration, in mandating that employers cover employees' contraception, drafted a religious exemption that excluded any religious institution that served persons who did not "share its religious tenets," or that employed such persons.[36] This tightly circumscribed exemption, with its "narrow focus on churches" and other insular religious bodies,[37] caused a furor. A leading Orthodox Jewish organization, for example, condemned the administration's apparent premise

> that if a religious entity is not insular, but engaged with broader society, it loses its "religious" character and liberties. Many faiths firmly believe in being open to and engaged with broader society and fellow citizens of other faiths. The Administration's ruling

32. *See* William P. Barrett, *America's Top 100 Charities*, FORBES (Dec. 16, 2021, 6:00 PM), https://www.forbes.com/lists/top-charities/?sh=1b8ef59d5f50.

33. *See, e.g.*, STEPHEN V. MONSMA, PLURALISM & FREEDOM: FAITH-BASED ORGANIZATIONS IN A DEMOCRATIC SOCIETY 15–43 (Rowman & Littlefield Publishers 2012) (giving statistics and examples).

34. KENNETH D. WALD & ALLISON CALHOUN-BROWN, RELIGION & POLITICS IN THE UNITED STATES 198 (Rowman & Littlefield Publishers, 6th ed. 2011).

35. *Obama Delivers Speech on Faith in America*, N.Y. TIMES (July 1, 2008), https://www.nytimes.com/2008/07/01/us/politics/01obama-text.html?pagewanted=all.

36. The exemption protected only an entity that met each of four criteria: "(1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under Internal Revenue Code section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii)." Group Health Plans & Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46623 (Aug. 3, 2011) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

37. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2374 (2020).

> makes the price of such an outward approach the violation of an organization's religious principles.[38]

After facing numerous lawsuits, the administration eventually gave substantial ground. It added the "accommodation" allowing religious nonprofits serving schools, social services, and health providers to opt out of paying for contraception, which would be covered directly by their insurers or by third-party administrators.[39]

But the narrow contraception exemption was not unique. As noted in the introductory section,[40] progressive regulators and commentators commonly assert that an entity that reaches out to offer services or employment to others must follow every regulation that the government places on it: that it can raise no claim to a religious-freedom exemption from such regulation.

C. Religious-Freedom Conflicts While Serving Others: Partly Acculturated Activity

The question, then, is how the government should treat religious institutions that serve or employ nonmembers when their faith-based standards conflict with governing laws. As noted above, I have used the term "partly acculturated" to denote such institutions or their specific activities: they reach out to the broader culture to serve or employ people, but simultaneously they maintain faith-based standards that depart from general social norms.[41] They differ both from insular, "unacculturated" groups (small sects) and from fully "acculturated" groups that incorporate general societal norms into their faith (many mainline Protestant groups).

We should make real efforts to protect religious freedom for partly acculturated religious activities and institutions. We should not reject their claims broadly or per se. Protection for them can only be presumptive, not absolute; but it should be strong. Here are two reasons why.

1. Equal Freedom for Partly Acculturated Groups

I've already given one reason for presumptive accommodation of "partly acculturated" institutions, that is, for a presumptive freedom in their service to others. Serving and employing people in the broader society while still maintaining distinctive religious norms is a legitimate, indeed familiar, way of being religious. Therefore, presumptive protection for such institutions promotes the First Amendment's goal of equality among differ-

38. *Union of Orthodox Jewish Congregations Critiques Administration Denial of Expanded Exemption for Religious Entities' Liberties in Health Insurance Plans; Calls on Congress to Redress Through Legislation*, OU ADVOCACY (Jan. 24, 2012), https://advocacy.ou.org/union-of-orthodox-jewish-congregations-critiques-administration-denial-of-expanded-exemption-for-religious-entities-liberties-in-health-insurance-plans-calls-on-congress-to-redress-through-legislat/.

39. *See Nonprofit Accommodation*, *supra* note 21.

40. *See supra* notes 1–10 and accompanying text.

41. *Partly Acculturated*, *supra* note 6.

ent religious groups and views. The Supreme Court has described such equality among religions as the "clearest command" of the Amendment's religion clauses.[42] Institutions take varying, nuanced positions toward society, sometimes reaching out to it while remaining different from it. The law should not force all organizations into two rigid categories of relationship: unacculturated or acculturated. As the Orthodox Jewish statement against the contraception mandate put it, an institution that determines to be "engaged with broader society and fellow citizens" should not thereby have to pay the price of "violat[ing its] religious principles."[43]

2. *Partial Acculturation and the Common Good*

In previous works, I have also offered reasons to think that "partly acculturated" groups have advantages in providing services to others.[44] Social scientists studying religion have documented and analyzed how "strict" churches tend to inspire greater commitment from their members than lenient groups do. The strict standards they demand of their members tend to screen out "free riders" (as sociologist Laurence Iannoccone has argued).[45] Relatedly, they tend to create trust among group members by signaling that all are committed to the group because all are willing to accept the costs of strictness (as anthropologist William Irons has argued).[46] At the same time, the commitment and discipline of an institution's members will provide minimal benefits to society if it directs its activities wholly inward. Thus, institutions that combine significant elements of both strictness and openness tend, other things being equal, to maintain a vigor that increases their likelihood of providing valuable services to society.

This dynamic may help explain why Catholic and evangelical Protestant agencies are particularly active in providing services. John DiIulio, for example, has written that Catholics, white evangelicals, and African-American evangelicals are "the three religious communities that figure most prominently in serving members and nonmembers alike"; each group "showers volunteer hours and money on nonmembers who tend to be unlike members in terms of race, socioeconomic status, or religion."[47] The hypoth-

42. Larson v. Valente, 456 U.S. 228, 244 (1982).

43. *See Union of Orthodox Jewish Congregations Critiques Administration Denial of Expanded Exemption for Religious Entities' Liberties in Health Insurance Plans; Calls on Congress to Redress Through Legislation*, *supra* note 38.

44. *Partly Acculturated*, *supra* note 6, at 1362–64; Thomas C. Berg, *Freedom to Serve: Religious Organizational Freedom, LGBT Rights, & the Common Good*, *in* RELIGIOUS FREEDOM, LGBT RIGHTS, & THE PROSPECTS FOR COMMON GROUND 307, 320–21 (William N. Eskridge & Robin Fretwell Wilson eds. 2019).

45. Laurence R. Iannaccone, *Why Strict Churches Are Strong*, 99 AM. J. SOCIO. 1180, 1183–211 (1994).

46. William Irons, *Religion as a Hard-to-Fake Sign of Commitment*, *in* EVOLUTION & THE CAPACITY FOR COMMITMENT 292 (Randolph M. Nesse ed., Russell Sage Found., 2001).

47. JOHN J. DILULIO, JR., GODLY REPUBLIC: A CENTRIST BLUEPRINT FOR AMERICA'S FAITH-BASED FUTURE 158 (2007).

esis here is that evangelical and Catholic groups often retain an especially strong religious identity that invigorates them and attracts donors, clients, and other constituencies. Simultaneously, the commitment and discipline of these organizations' members are not confined to helping each other; they extend to helping others in the broader society.

What does all this have to do with religious freedom? It actually connects to an important strain in America's religious-freedom tradition: that religious freedom, among its other justifications, serves the common good. One reason we protect voluntary religious institutions is that they are important means by which individuals develop and exercise "civic virtue"—a regard for the interests of others that government cannot mandate, and that is necessary to preserve order and harmony in a free society. A number of scholars have explicated and explored how religious freedom, properly understood and appropriately defined, can assist in the development of civic virtue and the promotion of the common good.[48]

In general, however, the American tradition holds that religion can only promote civic virtue if it is largely voluntary. Government sponsorship and promotion of a favored religion, James Madison warned, would corrupt it and thereby undermine its "purity and efficacy,"[49] including its capacity to nurture and mobilize civic virtue. For that reason, John Adams could tie the contributions of religion to the existence of religious freedom: "We should begin by setting conscience free," he wrote a correspondent in discussing the provisions of Massachusetts' new constitution in 1780.[50] "When all men of all religions . . . enjoy equal liberty, property . . . and an equal chance for honors and power[,] we may expect that improvements will be made in the human character and the state of society."[51]

Statements from these agencies indicate how their religious beliefs intertwine with the energy and commitment that make their services vigorous. In objecting to the original, narrow contraception-mandate exemption, the Catholic Health Association emphasized that its members' "mission and our ethical standards in health care are rooted in and inseparable from the Catholic Church and it's [sic] teachings about the dignity of the human person

48. *See, e.g.*, Stanley Carlson-Thies, *The Common Good Requires Robust Institutional Religious Freedom,* 15 U. ST. THOMAS L.J. 529 (2019); Mark David Hall, *America's Founders, Religious Liberty, and the Common Good,* 15 U. ST. THOMAS L.J. 642 (2019); Berg, *supra* note 44, at 308–24; Timothy L. Hall, *Religion & Civic Virtue: A Justification of Free Exercise,* 67 TUL. L. REV. 87 (1992); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991).

49. James Madison's Memorial and Remonstrance Against Religious Assessments (June 1785), *in* 1 MILESTONE DOCUMENTS IN AMERICAN HISTORY: EXPLORING THE PRIMARY SOURCES THAT SHAPED AMERICA 211, 221 (Schlager Group 2008).

50. Letter from John Adams to Richard Price (Apr. 8, 1785), *in* 8 THE WORKS OF JOHN ADAMS 232 (Charles F. Adams ed., 1856).

51. *Id.*

and the sanctity of human life from conception to natural death."[52] The general counsel of the prominent evangelical relief agency World Vision stated: "The key to our effectiveness is our faith, not our size. If we would lose our birthright, if we ever would not be able to determine our team, we'd lose our vision."[53] If these organizations face legal pressure to violate the tenets and identity that inspire them, they may have to curtail their work or exit altogether. In Philadelphia, Catholic Social Services' longstanding service to foster children and families would have ended had the Supreme Court not held, in *Fulton*, that the City's termination of its contract violated the agency's free exercise rights.[54] Similarly, "Catholic Charities branches in Massachusetts, Illinois, and the District of Columbia stopped performing adoptions because of rules requiring them to place children with same-sex couples," and "several nonprofit challengers to the [Obama administration's] contraception mandate warned that they would cease providing services rather than pay for medicines they believed to be sinful."[55]

Moreover, if religious agencies exit, we should be cautious in assuming that government or secular private agencies will fill the void. As political scientist Steven Monsma concluded in his review of the evidence of work by faith-based service organizations:

> [V]iolations of religious-freedom rights of faith-based organizations would mean a violation of the religious-freedom of many thousands of persons active in them as supporters, volunteers, paid staff, and recipients. Also, if these violations of religious-freedom rights would cause a significant number of faith-based organizations to go out of business, to withdraw from certain areas of service, or to reduce their size, a major portion of the nation's social safety net of human services would be lost.[56]

II. Sources of Protection for Freedom in Serving Others

What concrete protections are available to religious institutions serving others? The protections fall into several categories. The Supreme Court recently listed some of them in *Bostock v. Clayton County*,[57] in the course of

52. Letter from Carol Keehan, President, Cath. Health Ass'n, et al. to Marilyn Tavenner, Acting Adm'r, Ctrs. for Medicare & Medicaid Servs. 4 (June 15, 2012), https://www.chausa.org/docs/default-source/advocacy/061512-cha-comments-on-anprm-on-women_s-preventive-services-pdf.

53. Monsma, *supra* note 33, at 25 (alteration in original) (quoting Steven T. McFarland).

54. To participate in foster care placement, the agency needed to contract with the state, since "[w]hen children cannot remain in their homes, the City's Department of Human Services assumes custody of them" and then "contracts with private foster agencies to place some of those children with foster families." Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1875 (2021); As such, what Catholic Social Services sought was "an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs." *Id*. at 1882.

55. Berg, *supra* note 44, at 320–21.

56. Monsma, *supra* note 33, at 16.

57. 140 S. Ct. 1731 (2020).

holding that discrimination against gay, lesbian, or transgender people violated Title VII's existing prohibition on discrimination because of sex. Justice Gorsuch's majority opinion acknowledged that the ruling could create new conflicts between the requirements of federal law and the traditionalist sexual norms of many religious institutions. The Court said it was "deeply concerned with preserving the promise of the free exercise of religion," a "guarantee [that] lies at the heart of our pluralistic society."[58] The majority opinion did not rule on any religious-freedom defenses; none had been raised before it. But the dissenting opinion did list several potential sources of protection: (1) the constitutionally based "ministerial exception" from nondiscrimination laws; (2) an exemption in Title VII that allows religious institutions to prefer "individuals of a particular religion" in employment; and (3) the Religious Freedom Restoration Act, which requires that federal laws burdening religion must be justified by a "compelling" government interest.[59] Each of these protections has both promise and uncertainties. The next sections explore them, extrapolate from them, and add to them.

A. "Internal Governance" (Including the "Ministerial Exception")

The "ministerial exception," referenced in *Bostock*, bars the application of nondiscrimination laws to claims by "ministers" against their religious employers. That exception, which the Justices unanimously endorsed in 2012 in *Hosanna-Tabor*,[60] rests on the premise that discrimination suits by ministers "interfere[ ] with the internal governance of the church, depriving [it] of control over the selection of those who [teach and] personify its beliefs."[61] The exception follows from both "the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments," and "the Establishment Clause, which prohibits government involvement in . . . ecclesiastical decisions" such as "determin[ing] which individuals will minister to the faithful."[62] The exception applies to all prohibited grounds of discrimination—race, sex, disability, and others—and applies even when the religious entity does not assert a religious reason for its employment decision.[63]

How broad is the ministerial exception's reach? It extends well beyond clergy proper. In *Our Lady of Guadalupe School v. Morrissey-Berru*,[64] discussed at the beginning of this article, the Supreme Court held that the exception applied to teachers in private schools who have duties teaching religion. The Ninth Circuit had said that teachers fell outside the category of

58. *Id.* at 1754.
59. *Id.* at 1780–81.
60. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).
61. *Id.* at 173.
62. *Id.*
63. *Id.* at 194–95.
64. 140 S. Ct. 2049, 2063 (2020).

"ministers" because they lacked a formal ministerial title or training.[65] But the Supreme Court ruled them ministers, reasoning persuasively that the key factor is whether the employee has "important responsibilit[ies]" or "vital religious duties" such as "lead[ing] a religious organization, conduct[ing] worship services or important religious ceremonies or rituals, or serv[ing] as a messenger or teacher of [the] faith."[66] "What matters, at bottom, is what the employee does," and "educating young people in their faith, . . . training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school."[67]

More recently, four justices strongly suggested that the ministerial exception should also apply to teachers whose schools direct them to use a "faith-based lens" in teaching "nominally secular" subjects such as literature, history, or (in the case of the plaintiff there) social work.[68] "[R]eligious education at [such schools]," these justices noted, "does not end as soon as a student passes [distinct] required courses [in theology] and leaves the chapel."[69]

The exception should also apply beyond nondiscrimination suits, to other claims that "challeng[e] the church's right to evaluate and select its own ministers."[70] Even some claims of breach of contract should be barred. A religious institution can bind itself to norms that involve no religious determinations, like the amount of pay due under a severance clause; but a contract limiting dismissal to situations of "cause" would usually require impermissible judicial evaluation of the minister's performance or qualifications. Several ministerial-exception opinions, beginning with the seminal decision in *McClure v. Salvation Army*,[71] also speak in terms of broader "control" and supervision over the minister's duties and salary. On this basis, several courts have barred wage and hour claims too.[72]

Even so, the ministerial exception does not cover every employee or every cause of action against a religious institution. Not every teacher can plausibly be called a minister—let alone every employee within a religious institution. Courts will want to place some employees outside the exception—examples in a school would include custodial staff, or teachers with

65. Morrisey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x. 460, 461 (9th Cir. 2019) (following Biel v. Saint James Sch., 911 F.3d 603, 608–11 (9th Cir. 2018)).

66. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2064, 2066; *Id.* at 2064 (quoting *Hosanna-Tabor Evangelical Church & Sch.*, 565 U.S. at 199 (Alito, J., concurring)).

67. *Id.* at 2064.

68. Gordon Coll. v. DeWeese-Boyd, 142 S. Ct. 952, 954 (2022) (statement of Alito, J., joined by Thomas, Kavanaugh, and Barrett, JJ., respecting denial of certiorari).

69. *Id.* at 955.

70. Douglas Laycock, *Hosanna-Tabor & the Ministerial Exception,* 35 HARV. J.L. & PUB. POL'Y 840, 861 (2012).

71. 460 F.2d 553, 560 (5th Cir. 1972).

72. *See* Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 307 (4th Cir. 2004); Schleicher v. Salvation Army, 518 F.3d 472 (7th Cir. 2008); Alcazar v. Corp. of Cath. Archbishop of Seattle, 598 F.3d 668, 673 (9th Cir. 2010).

no religious responsibilities—to avoid divesting a very broad range of employees from all nondiscrimination protections.[73]

But importantly, the ministerial exception does not stand alone: it's just one example of an institution's broader First Amendment freedom over its "internal governance." The Court made clear in *Morrissey-Berru*, reinforcing *Hosanna-Tabor*, that the exception is part of constitutional autonomy over "internal management decisions that are essential to the institution's central mission":

> The constitutional foundation for our holding [in *Hosanna-Tabor*] was the general principle of church autonomy to which we have already referred: independence in matters of faith and doctrine and in closely linked matters of internal government. The three prior decisions on which we primarily relied drew on this broad principle, and none was exclusively concerned with the selection or supervision of clergy.[74]

Among those prior decisions was *Serbian Orthodox Diocese v. Milivojevich*,[75] which prohibited a state court from overturning a hierarchical church's reorganization of its dioceses (which included, but went beyond, defrocking a dissident bishop). *Milivojevich* held, in language quoted in *Hosanna-Tabor*, that the First Amendment "permit[s] hierarchical religious institutions to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters."[76]

Extending institutional autonomy beyond the ministerial exception, Supreme Court and lower-court decisions lay out several "subject-matter areas within which civil officials have been barred categorically from exercising authority":

> (1) questions about correct doctrine and resolving doctrinal disputes; (2) the choice of ecclesiastical polity, including the proper application of procedures set forth in organic documents, bylaws, and canons; (3) the selection, credentials, promotion, discipline, and retention of clerics and other ministers; (4) the admission, discipline, and expulsion of organizational members; (5) disputes over the direction of the ministry, including the allocation of resources; and, (6) communication to the organization's clerics or the laity about matters of governance.[77]

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73. *See, e.g.*, EEOC v. Miss. Coll., 626 F.2d 477, 485 (5th Cir. 1980) (rejecting "role model" argument as ground for applying ministerial exception to all of a Baptist college's faculty).

74. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060–61 (2020) (citing Hosanna-Tabor Evangelical Church & Sch. v. EEOC, 565 U.S. 171, 186 (2012)).

75. 426 U.S. 696 (1976).

76. *Id.* at 724 (quoted in *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 565 U.S. at 187).

77. Carl H. Esbeck, *A Religious Organization's Autonomy in Matters of Self-Governance: Hosanna-Tabor and the First Amendment*, 13 ENGAGE 168, 169 (Mar. 2012) (footnotes and citations omitted).

These categories of institutional autonomy reflect a pair of constitutional principles. One is that government officials, including judges, should not decide religious questions and thereby override religious organizations' own understanding of their doctrines. One feature of religious establishments was that government officials would determine religious orthodoxy; so conversely, one feature of disestablishment must be that litigation may not "turn on the resolution by civil courts of controversies over religious doctrine and practice."[78]

But institutional autonomy does not mean merely that government officials should avoid deciding religious questions. The deeper, broader principle of autonomy is substantive: that religious institutions should be able to make their own decisions concerning their internal matters of government and practice. To return to the ministerial exception as an example, the Court has unanimously said that "[t]he purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason"—a reason that the court might improperly second-guess. The exception goes further and "ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone."[79]

B. RFRA and Its State Counterparts

As to employees who are not "ministers," religious institutions must rely on other sources of protection. *Bostock* mentions the Religious Freedom Restoration Act (RFRA), which prohibits the federal government from substantially burdening religious exercise unless imposition of the burden furthers a compelling government interest and is the least restrictive means of furthering that interest.[80] The same or similar rule governs state and local laws in about two-thirds of the states, through state statutes tracking RFRA or through court rulings interpreting state constitutions.[81]

The "compelling interest" protection is potentially stringent. But RFRA and its state counterparts do raise complications. One, at the threshold, is whether the statute applies in suits brought by private parties, such as individuals claiming discrimination, rather than by government. The federal RFRA states that "[a] person whose religious exercise has been burdened in violation of [RFRA] may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a govern-

78. Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

79. *Hosanna-Tabor Evangelical Lutheran Church & Sch.,* 565 U.S. at 194–95 (quoting Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 119 (1952)).

80. 42 U.S.C. § 2000bb-1(b); Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

81. *See Federal & State RFRA Map*, BECKET: RELIGIOUS LIBERTY FOR ALL, https://www.becketlaw.org/research-central/rfra-info-central/map/ (last visited Sept. 5, 2022) (which shows that thirty-two states apply strict scrutiny to all substantial burdens on religion, twenty-three of those through RFRAs).

ment."[82] Some courts read the final phrase to say that relief can run only against the government itself, not against a private party who seeks to impose liability.[83] But "government" can include the judges or juries that impose such liability; the statute defines the term to include any "branch, . . . instrumentality, and official (or other person acting under color of law) of the United States."[84] A court's imposition of liability pursuant to a legal rule is a "government"-imposed burden under RFRA, just as the Court has held—in several landmark cases—that defamation and other tort suits by individuals can burden First Amendment rights of free speech.[85] As the Eighth Circuit said in holding RFRA applicable in a bankruptcy suit between private parties: "The bankruptcy code is federal law, the federal courts are a branch of the United States, and [the court's] decision in the present case would involve the implementation of federal bankruptcy law."[86]

Moreover, the statute's subsequent reference to "obtain[ing] appropriate relief against a government," read in context, does not limit RFRA to cases with a government party. The phrase was intended simply to make a clear statement that relief against the government was not entirely barred by sovereign immunity.[87]

Some courts have held RFRA inapplicable to private-party suits on a different textual ground. The statute says that "government" must "demonstrate[ ]" the existence of a compelling interest and least restrictive means and that it bears the burden of producing ("going forward with") evidence on these issues."[88] Some courts find it "self-evident that government cannot meet [this] burden if it is not a party to the suit."[89] But that language about litigation obligations does not change the fact that "government" imposes a "substantial burden" on religious exercise when a court imposes liability in a private-party suit. And "the private plaintiff can undertake to justify the burden," by demonstrating a compelling interest, "if he chooses to do so."[90]

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82. 42 U.S.C. § 2000bb-1(c).

83. *See, e.g.*, Listecki v. Off. Comm. of Unsecured Creditors, 780 F.3d 731, 736–37 (7th Cir. 2015). *But see, e.g.*, Hankins v. Lyght, 441 F.3d 96, 103 (2d Cir. 2006) (rejecting this argument).

84. 42 U.S.C. § 2000bb-2(1).

85. *See, e.g.*, N.Y. Times v. Sullivan, 376 U.S. 254 (1964) (suit for defamation); Time, Inc. v. Hill, 385 U.S. 374 (1967) (suit for defamation); Hustler Mag., Inc. v. Falwell, 485 U.S. 46 (1988) (suit for intentional infliction of emotional distress); Snyder v. Phelps, 562 U.S. 443 (2011) (suit for intentional infliction of emotional distress).

86. *In re* Young v. Crystal Evangelical Free Church, 82 F.3d 1407, 1417 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997).

87. *See* Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Parties,* 99 VA. L. REV. 343, 351–55 (2013) (tracing the background of the phrase's addition).

88. 42 U.S.C. §§ 2000bb-1(b), 2000bb-2(3).

89. Listecki v. Off. Comm. of Unsecured Creditors, 780 F.3d 731, 736 (7th Cir. 2015); *see also* Billard v. Charlotte Cath. High Sch., No. 3:17-cv-00011, 2021 WL 4037431, at *15–18 (W.D.N.C. Sept. 3, 2021).

90. Chaganti, *supra* note 87, at 357.

The proposition that the private plaintiff shoulders the government's obligation of justification makes particular sense for Title VII suits, the context in which the Supreme Court in *Bostock* referred to RFRA.[91] A private individual cannot simply bring a Title VII suit but must first file a charge with the Equal Employment Opportunity Commission (EEOC).[92] In order to sue, the individual must receive a "notice of right to sue" from the EEOC, either because the agency has closed its investigation or because the individual requests the notice before the investigation's close.[93] Even if the EEOC finds "reasonable cause" to believe discrimination has occurred, and even if its conciliation efforts with the employer are unsuccessful, the agency still "has discretion which charges to litigate" and which to authorize for private litigation by a right-to-sue notice.[94] In short, if the private plaintiff brings suit, it's because the EEOC—"the government"—has authorized it through a right-to-sue notice. The private plaintiff thus shoulders the litigation obligation that the government would have had, including the obligation to justify a substantial burden under RFRA.[95]

Moreover, if RFRA defenses are unavailable in private-party suits, the statute will be rendered meaningless in protecting institutions' rights to make employment choices based on their religious tenets. Recall that *Bostock* listed RFRA as a key protection for religious freedom, the right that it was "deeply concerned with preserving" because it "lies at the heart of our pluralistic society."[96] The Court has also emphasized that "RFRA 'provide[s] very broad protection for religious liberty'" because—among other reasons—"it 'applies to all Federal law, and the implementation of that law.'"[97] But the "vast majority" of Title VII suits are brought by private parties, not the government.[98] For example, in fiscal years 2000–2013, the EEOC "filed lawsuits to enforce between 0.2% and 0.6% of the charges it

91. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

92. 42 U.S.C. § 2000e-5(e)(1); *see* Fort Bend Cnty. v. Davis, 139 S. Ct. 1843, 1846 (2019) (describing process).

93. *Filing a Lawsuit,* U.S. EEOC, https://www.eeoc.gov/filing-lawsuit (last visited Oct. 5, 2022).

94. *Id.*

95. If the EEOC does sue, the private plaintiff's avenue to court is to intervene in the government's suit, which again reinforces that the person is undertaking the government's obligation. *See* 42 U.S.C. § 2000e-5(f)(1) (giving "the person or persons aggrieved . . . the right to intervene in a civil action brought by the Commission").

Not only does the private plaintiff undertake the government's obligation to "demonstrate" a compelling interest. In addition, the *court*, the government actor enforcing the burdensome law, must demonstrate that the burden is justified. The court must make that demonstration by applying the compelling interest test.

96. *Bostock*, 140 S. Ct. at 1754.

97. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2383 (2020) (bracket in original) (quoting Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693 (2014)); *Id.* (quoting 42 U.S.C. § 2000bb-3(a) (1993)).

98. Stephanie Bornstein, *Rights in Recession: Toward Administrative Antidiscrimination Law,* 33 YALE L. & POL'Y REV. 119, 130 n.58 (2014).

received each year. In contrast, during the same time period plaintiffs filed . . . on average *55 times as many lawsuits as filed by the EEOC each year*."[99] So confining RFRA to government suits would confine protection to less than one-fiftieth of the lawsuits where Title VII burdened religious exercise.[100] That would make a mockery of *Bostock*'s commitment to "preserving the promise of the free exercise of religion."[101]

When a federal or state RFRA applies, the imposition of a substantial burden on religious exercise must satisfy the compelling interest test. In enacting RFRA, Congress explicitly found that "compelling interest" was a "workable test for striking sensible balances between religious liberty and competing prior governmental interests."[102] Part III returns to the question of how to protect religious freedom strongly while still acknowledging the important interests of others and society.

C. Specific Statutory Exceptions

Bostock also noted that religious institutions defending their employment decisions can rely on a specific exemption in Title VII itself. Section 702(a) provides:

> This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.[103]

This provision is an example of religious exemptions found throughout specific federal and state statutes, often protecting religious institutions. They include, for example:

- another Title VII exemption for decisions preferring "employees of a particular religion" by religiously affiliated higher education institutions;[104]
- a Title IX exemption for sex discrimination by educational institutions receiving federal funds if the institution "is controlled by a religious organization [and] the application of this subsection would not be consistent with the religious tenets of such organization";[105]
- an exemption in ERISA, the statute extensively regulating employee benefit plans, for "church plans," defined in relevant respect as plans operated by institutions "controlled by or as-

99. *Id.* at 130 (emphasis added).

100. There is no reason to think the 55:1 ratio described above changes significantly in suits burdening religious exercise.

101. *Bostock*, 140 S. Ct. at 1754.

102. 42 U.S.C. § 2000bb(a)(5).

103. 42 U.S.C. § 2000e-1(a) (cited in *Bostock*, 140 S. Ct. at 1731).

104. *Id.* at § 2000e-2(e).

105. 20 U.S.C. § 1681(a)(3).

sociated with a church or a convention or association of churches";[106]

- the Obama administration's accommodation for religious nonprofits that object to the federal mandate of insurance coverage for employees' contraception, and the Trump administration's expansion of that accommodation into a full exemption;[107] and
- numerous religious exceptions in federal, state, and local laws and regulations from a host of other legal mandates. For example, the resolution of conflicts between same-sex marriage and religious objections was affected in multiple states by preexisting religious exemptions and by new exemptions adopted to accompany same-sex marriage recognition.[108] More broadly, a 1992 survey found that more than 2,000 federal and state statutes around the nation had religious exemptions, many of them protecting religious institutions.[109]

The varying specific exemptions raise their own specific issues. But two questions cut across multiple settings: first, what makes an institution "religious" in nature or "controlled by" or "associated with" a religious group, and second, does the institution lose that status when it reaches out to employ or serve others? For example, under Supreme Court caselaw the National Labor Relations Board may not intrude on relations between religious educational institutions and their faculty to determine the proper terms and conditions of employment for mandatory collective bargaining.[110] But in *University of Great Falls v. NLRB*,[111] the Board asserted authority over such matters at a small Catholic college, asserting that the college was no longer "religious" because it welcomed many non-Catholics as students and faculty, had no requirement to attend mass, and "tolerated, even respected," other religious views. Under the Board's logic, an institution loses its freedom as a religious institution, in significant measure, when it reaches out to serve or employ others.

But the D.C. Circuit overturned the Board, protecting the college and holding that "if [an organization] is ecumenical and open-minded, that does

106. 29 U.S.C. § 1002(33)(C)(i).

107. *See* Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39873–74, 39886–87 (July 2, 2013) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pts. 2510 & 2590, 45 C.F.R. pts. 147 & 156) (Obama accommodation); Religious Exemptions & Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47792–812 (Oct. 13, 2017) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147) (Trump exemption).

108. *See, e.g.*, Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, & Other Clashes Between Religion and the State*, 53 B.C. L. Rev. 1417, 1433–45 (2012) (collecting provisions).

109. James E. Ryan, *Smith & the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1445–46, nn.217–60 (1992).

110. *See* NLRB v. Cath. Bishop of Chi., 440 U.S. 490 (1979).

111. Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1345–46 (D.C. Cir. 2002).

not make it any less religious, nor [government] interference any less a potential infringement of religious liberty."[112] In an important discussion, the court reasoned that disqualifying an institution from exemption merely because it reaches out to other faiths violates two key principles. First, it entangles the government in second-guessing an institution's view of its faith, seizing on its ecumenical attitude to question, "[I]s it *sufficiently* religious?"[113] Second, it violates equality of liberty among religious views—"the most basic command" of the Religion Clauses, as already noted—because institutions may legitimately choose to be "open-minded and ecumenical" as a matter of faith.[114]

Instead, the D.C. Circuit adopted a more flexible test, holding that an institution was "religious" within the exemption "if it (a) 'holds itself out to [the relevant public]' as providing a religious educational environment" and "(b) is organized as a 'nonprofit.'"[115] This standard, drawn from an earlier court of appeals opinion by then-Judge Stephen Breyer, avoided the constitutional infirmities above—neither "intrud[ing] upon the free [and equal] exercise of religion nor subject[ing] the institution to questioning about its motives or beliefs"—while still ensuring that the institution's claim was "*bona fide*" in that "it holds itself out as providing a religious educational environment, even if its principal academic focus is on secular subjects."[116] The court added that with such "public representations," market forces would limit abusive or excessive claims of exemption:

> While public religious identification will no doubt attract some students and faculty to the institution, it will dissuade others. In other words, it comes at a cost. Such market responses will act as a check on institutions that falsely identify themselves as religious merely to obtain exemption from the [labor law].[117]

Similar questions can arise under exemptions that turn on whether an entity is "controlled by" or "associated with" a religious group or view. Such control or association can certainly be present even when the organization is "ecumenical" in serving or employing non-adherents. And in the contraception mandate, the Obama administration eventually supplemented its indefensibly narrow initial exemption, which had excluded entities that served or employed non-adherents, with the accommodation that required a religious nonprofit's insurer to pay if the nonprofit simply certified that it had a religious objection to providing contraception. Although that did not

112. *Id.* at 1346.

113. *Id.* at 1343 (emphasis in original) (holding that this violates *Cath. Bishop of Chi.* and many other Supreme Court decisions forbidding such examination and second-guessing).

114. *Id.* at 1346.

115. *Id.* at 1343 (quoting Universidad Cent. de Bayamon v. NLRB, 793 F.2d 383, 400, 403 (1st Cir. 1985) (en banc)).

116. U. of Great Falls v. NLRB, 278 F.3d 1335, 1344 (D.C. Cir. 2002) (citing *Bayamon*, 793 F.2d at 400).

117. *Id.*

eliminate all religious-freedom problems, it at least ended the exclusion of institutions that serve others.

The issue also arises under section 702(a) of Title VII, mentioned above and in *Bostock*, which exempts a "religious" entity from Title VII "with respect to employment of individuals 'of a particular religion.'"[118] Suppose an entity does not adhere to such a religious hiring policy in all cases; that is, it sometimes hires non-adherents. Does it thereby lose the ability to claim it is "religious" under the exemption if it determines that it must hire on a religious basis for a specific job or position? Again, to withhold protection in that case would impinge on the right to freedom in serving others. For these reasons, some courts applying the exemption have adopted a flexible standard like that in *University of Great Falls*: an entity is exempt if it sets forth a "religious purpose" or purposes in its governing documents, "engage[s] in activity [furthering] those religious purposes, and . . . holds itself out to the public as religious."[119] Other courts, by contrast, follow a multi-factor test that includes the dubious inquiry whether the institution's "membership is made up of coreligionists."[120] Fortunately, that is only one factor among nine in the multi-factor test.[121]

The Title VII exemptions raise another issue relevant to the right to serve others: how far does the right to hire individuals "of a particular religion" extend? Courts have been clear that the language includes the right not just to prefer members of the faith, but also to demand that employees—whether members of the faith or not—follow religiously based standards of conduct, including sexual conduct.[122] That reading also fits with Title VII's definitions section, which states that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief."[123]

But to what claims by plaintiffs does the exemption apply? Some courts have held that it applies only to claims of religious discrimination, not to other claims such as sex discrimination (which, under *Bostock*, now encompasses sexual-orientation or gender-identity discrimination).[124] But

118. 42 U.S.C. § 2000e-1(a). A parallel provision in the next Title VII section protects religious colleges specifically. *Id.* § 2000e-2(e)(2) (protecting a college if it is, "in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion").

119. Spencer v. World Vision, Inc., 633 F.3d 723, 734 (9th Cir. 2011).

120. LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226 (3d Cir. 2007).

121. *Id.*

122. *See, e.g.*, Curay-Cramer v. Ursuline Acad. of Wilmington, Del. Inc., 450 F.3d 130, 138–42 (3d Cir. 2006); Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 624 (6th Cir. 2000); Killinger v. Samford Univ., 113 F.3d 196, 199 (11th Cir. 1997); Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991).

123. 42 U.S.C. § 2000e(j).

124. *See, e.g.*, Stephanie N. Phillips, *A Text-Based Interpretation of Title VII's Religious-Employer Exemption*, 20 TEX. REV. L. & POL. 295, 308–12 (2016) (discussing case law regarding Title VII's religious employer exemption).

the exemption should apply to the broader range of claims. That conclusion follows directly from the exemption's opening text, which says that "[t]his *subchapter* shall not apply to" a religious employer "with respect to the employment of individuals of a particular religion."[125] The relevant "subchapter" in question is Title VII as a whole, not just its prohibition on religious discrimination. As Judge Easterbrook recently wrote, courts and commentators that have restricted the exemption's application "do not explain why 'this subchapter' means something less than all of Title VII."[126] The mere fact that the plaintiff asserts sex discrimination as the prohibited ground should not make the exemption inapplicable.

It's true that exemption only protects an organization's ability to prefer "individuals of a particular religion." But as noted above, the caselaw and the textual definition of "religion" make clear that an employment preference for a "particular religion" includes a preference for adherence to a particular religious tenet of behavior.[127] Thus, an institution that consistently applies a rule of employee conduct based on its religious tenets should fall within the exemption even when the plaintiff claims sex discrimination rather than religious discrimination. Otherwise, an institution would be barred from favoring its "particular religion"—that is, its particular religiously based standard of conduct—in employment, in violation of the exemption's terms.

If the Title VII exemption protects only against religious-discrimination claims, not LGBTQ-discrimination claims, institutions may well respond by hiring only members who fully affiliate with the faith; that is, the institutions may require extensive and rigid statements of belief from employees concerning both doctrine and conduct. By doing so, they would show that their hiring policy was based solely on religious affiliation—religious discrimination in the narrow sense—and not on some other protected characteristic. Thus, narrow interpretations of the Title VII exemption pressure institutions to be more restrictive and "sectarian" in employment, limiting their hiring to formal members of the specific faith. Similar logic may lead them to limit their services only to formal members. They have the legal right to put such limits on their services in many settings, such as housing rentals and educational admissions;[128] narrowing the Title VII exemption would push them into relying on that right.

125. 42 U.S.C. § 2000e-1(a) (emphasis added).

126. Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931, 946 (7th Cir. 2022) (Easterbrook, J., concurring).

127. *See Curay-Cramer*, 450 F.3d at 130; *Hall*, 215 F.3d 618; *Killinger*, 113 F.3d at 196; *Little*, 929 F.2d, at 944; 42 U.S.C. § 2000e(j).

128. Exemptions allowing religious institutions to favor members in housing include 42 U.S.C. § 3607(a) (1968); KY. REV. STAT. ANN. § 344.365 (West 1994); N.Y. COMP. CODES R. & REGS. tit. Unlawful Discriminatory Pracs. § 8-107(12) (2022); Exemptions allowing admissions preferences for members include *see, e.g.*, N.Y. EXEC. LAW § 296 (McKinney 2022); OHIO REV. CODE ANN. § 4112.02(O) (West 2021).

Such a development should cause concern. When a religious institution confines its employment or services to formal members of the faith, it may reduce the number of situations in which non-adherents are affected by the religious institution's standards of conduct. But it also reduces non-adherents' opportunities to receive beneficial jobs or services from those institutions, some of which are significant providers. Many non-adherents would not have come in conflict with the conduct standards; those persons will simply lose access to a potentially beneficial provider if the provider has to constrict who it will serve in order to avoid liability. The net result for non-adherents may be a detriment, rather than a benefit.

The potential costs go further. Pressuring religious organizations to become more insular will also add another incentive for societal balkanization, at a time when people already sort themselves into groups whose members hold similar views across the whole range of important social issues.[129] It will reduce opportunities for employees of differing beliefs to work together in such settings. These effects should be considered before we adopt rules that pressure institutions to discontinue employing or serving non-adherents.

D. The Free Exercise Clause: Overruling Smith?

The backstop for protection, against federal regulation or any state's regulation, is the Free Exercise Clause of the First Amendment. Outside of the ministerial exception and other cases of core internal governance, free exercise rights are governed by the rule of *Employment Division v. Smith*: a substantial burden on religious exercise triggers strict scrutiny if, but only if, the law imposing the burden is "neutral [toward religion and] generally applicable."[130] The rule is often described as unprotective, a rejection of religious-liberty exemptions. But in recent years, the Court has used it to protect religious exercise by holding that a law fails the general applicability standard if it includes exceptions, even a small number, for other, secular interests.

In *Fulton v. City of Philadelphia*,[131] for example, the Court held that Philadelphia could not terminate its foster-care services contract with the Catholic agency on the ground that the agency declined to certify same-sex foster couples, when the city already allowed exceptions from the nondiscrimination rule "in [the relevant official's] sole discretion."[132] The Court relied on language, from other decisions as well as from *Smith* itself, that (1) a law "lacks general applicability if it prohibits religious conduct while

129. *See, e.g.*, EZRA KLEIN, WHY WE'RE POLARIZED (Avid Reader Press, 2020); BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART (2008).

130. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879, 881 (1990) [hereinafter *Employment Div. v. Smith*].

131. 141 S. Ct. 1868 (2021).

132. *Id.* at 1878.

permitting secular conduct that undermines the government's asserted interests in a similar way"; and (2) "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[133]

The constitutional wrong at which these principles aim is that the state has "devalue[d] religious reasons for [acting] by judging them to be of lesser import than nonreligious reasons."[134] Even one or very few exceptions for secular interests can trigger strict scrutiny if they undermine the law's purposes as much as a religious exception would. Several appellate decisions have so held. Prominent among them is *Fraternal Order of Police v. Newark*, where the opinion by then-Judge Alito held that when a police department's rule against officers wearing beards contained an exemption for officers with medical conditions, the department also had to exempt Muslim officers who wore beards because they believed the Qu'ran commanded it.[135] The court reasoned that by "provid[ing] medical—but not religious—exemptions from its 'no-beard' policy, [the department] unconstitutionally devalued [the officers'] religious reasons for wearing beards by judging them to be of lesser import than medical reasons."[136] When a law treats some interests as valuable enough to exempt and others not, it must treat religious exercise, a constitutional right, among the valued interests.

As *Fulton* shows, the prohibition on devaluing religion through selective exemptions can provide significant constitutional protection for religious institutional freedom. Many statutes include exceptions for various secular interests deemed important; legislatures also sometimes include safety valves for officials to make discretionary exceptions. The Court also focused on the selectivity of laws in its decisions striking down state and local restrictions on in-person worship gatherings during the COVID-19 pandemic.[137] I've argued elsewhere that the Court was justified, after months of shutdowns affecting the core religious activity of worship, in the pandemic, in requiring officials to justify limiting the numbers at worship

133. *Id.* at 1877 (quoting *Employment Div. v. Smith,* 494 U.S. at 884); Bowen v. Roy, 476 U.S. 693, 708 (1986); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993).

134. *Church of the Lukumi Babalu Aye, Inc.,* 508 U.S. at 537–38.

135. Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 364–66 (3d Cir. 1999) [hereinafter *Fraternal Order of Police v. Newark*]; *see also* Douglas Laycock and Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 19–23 (2016) (describing cases from four federal courts of appeals, two state appellate courts, and several federal district courts).

136. *Id.* at 366 (footnote omitted).

137. *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294 (2021); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).

gatherings more than in other settings.[138] But I've also argued that given the complexity of public health judgments, such review "should still contain a fair measure of deference": "[T]he Court in COVID-19 cases should not have readily found 'devaluing' of religion, and a lack of general applicability, based on a small number of protected nonreligious activities."[139]

Nevertheless, even when *Smith*'s general applicability rule is read in this protective fashion, it creates problems. There is uncertainty over how many secular exceptions defeat general applicability, whether uncodified exceptions count, or whether any given exception undermines government interests to the same extent as the religious exception would. The cases about worship gatherings and COVID-19 dramatize the uncertainty. Is a worship service more like a retail store or manufacturing facility, which many public health orders have permitted to open, or like a concert or athletic event, which generally have remained closed? Does that comparison depend on how stringent the regulation is? What is the standard of judicial scrutiny on the question whether a secular exception causes analogous harms to a religious exception? And why, in the end, should the right to exercise religion depend so heavily on whether the jurisdiction in question happens to regulate other interests—a rule that makes free exercise (in Christopher Lund's apt phrasing) a matter of "constitutional luck."[140] As Douglas Laycock and I have argued, under *Smith*'s rule, "[c]ourts often refuse protection when they shouldn't. Litigation is prolonged even when courts get it right. . . . No matter how stringently general applicability is interpreted, free exercise under *Smith* will never protect in all the cases where it should."[141]

The Court in *Fulton* dodged the question whether to overrule the unprotective side of *Smith*'s rule and apply heightened scrutiny even to generally applicable laws. Justice Alito, joined by Justices Thomas and Gorsuch, argued at length for overruling *Smith*.[142] But Justice Barrett, joined by Justice Kavanaugh, held off. Barrett too suggested that *Smith*'s rule was wrong,[143] but she wanted to know more about what would replace it if it were overruled.[144]

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138. Thomas C. Berg, *Religious Freedom Amid the Tumult*, 17 U. ST. THOMAS L.J. 735, 736–44 (2022) (discussing the justification of limiting the size of worship gatherings during the pandemic).

139. *Id.* at 744.

140. Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627 (2003) (discussing constitutional luck getting an exemption under the new Free Exercise Clause).

141. Brief for Christian Legal Society et al. as Amici Curiae Supporting Petitioners, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123).

142. *Fulton*, 141 S. Ct. at 1883–1925 (Alito, J., concurring in the judgment).

143. *Id.* at 1882 (Barrett, J., concurring) ("As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination.").

144. *Id.* at 1882–83.

Generally applicable laws are the ones most likely to place serious restrictions on a religious organization that serves others in society and simultaneously adheres to distinctive norms. Overturning *Smith*'s rule would shift focus to the matters that should be central in free exercise cases. It would mean that when a law significantly burdens the important, constitutionally recognized interest in religious exercise, the imposition of that burden requires a strong justification.

III. Drawing Proper Lines

How can we protect the important freedoms of religious organizations while still protecting social peace and the interests of others? Taking account of both sides is vital in the light of themes articulated above. Although religious organizational freedom in itself serves the common good, it can only do so fully and convincingly when it has boundaries that take adequate account of the interests of others. Likewise, taking account of such other interests is necessary to building consensus for religious freedom in our polarized society.

Two recurring principles can help draw sensible lines: (1) notice to affected persons (employees or clients) concerning an institution's religiously based policies, and (2) alternatives to receive services or employment from other providers. Consider, for example, a controversial 2016 proposal in the California legislature that would have required religious colleges to drop their traditionalist standards of sexual conduct for students and faculty or else face the disqualification of their students from state-funded grants ("Cal Grants").[145] The serious harm the bill would have done to religious colleges was unnecessary, because LGBTQ prospective students (1) would likely know of these colleges' beliefs and (2) would have many other higher-education institutions they could attend.

Religious providers often give reasonable notice of their beliefs by "holding themselves out" as religious, as the courts have required them to do under religious-exemption provisions discussed above. (While the California bill as enacted dropped the proposed penalty on traditionalist sexual-conduct policies,[146] it did legitimately require that colleges disclose such policies so that LGBTQ students had notice before deciding to attend there). And alternatives matter. For example, if mergers have left a Catholic hospital with a healthcare monopoly in a region, it becomes harder to accommodate the hospital's objections to doing particular procedures.

145. *See, e.g.*, Thomas C. Berg, *Does This New Bill Threaten California Christian Colleges' Religious Freedom?*, Christianity Today (July 5, 2016), https://www.christianitytoday.com/ct/2016/july-web-only/california-sb-1146-religious-freedom.html.

146. Patrick McGreevy, *State Senator Drops Proposal that Angered Religious Universities in California*, L.A. Times (Aug. 10, 2016, 1:42 PM), https://www.latimes.com/politics/essential/la-pol-sac-essential-politics-updates-201608-htmlstory.html#state-senator-drops-proposal-that-angered-religious-universities-in-california.

But cases of religious-provider monopolies are relatively rare. Typically, as in the case of California colleges, religious institutions are part of a diverse set of providers. Some beneficiaries and employees want a religious setting. With a diversity of providers, religious entities can reach that segment of the population, while other entities reach different segments. Families can choose to send their children to traditional Catholic schools, and evangelical students with traditional views can attend evangelical colleges, while public institutions and liberal-oriented private institutions provide many options that are better for, say, LGBTQ students.

When notice and non-religious alternatives exist, then legal coercion against the religious organization—potentially forcing it to exit the field—threatens to deprive many people of its distinctive contribution while doing very little to make services available to others. In those cases, protections discussed above in Parts II-B and II-C should apply. Legislatures and executive agencies should be willing to step in and adopt statutory or administrative exemptions. And courts interpreting a constitutional provision or a federal or state RFRA should hold that forcing the religious institution to act against its tenets and identity fails to serve an important ("compelling") governmental interest by the least restrictive means.

The presence of alternative providers was important in the Court's decision in *Fulton*. There the evidence was clear that

> [n]o same-sex couple has ever sought certification from CSS [Catholic Social Services, the agency in question]. If one did, CSS would direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples. For over 50 years, CSS successfully contracted with the City to provide foster care services while holding to these beliefs.[147]

This evidence contributed to the Court's finding that terminating the contract with CSS would not serve a compelling interest. Although "[m]aximizing the number of foster families" was an "important goal[ ]," the majority said, "the City fails to show that granting CSS an exception will put [that] goal[ ] at risk. If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents."[148] (As I've observed, religious institutions—including CSS—typically can reach a distinctive set of beneficiaries and other participants). In its conclusion, the unanimous Court observed that "CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else."[149] That seems an apt description of

147. *Fulton*, 141 S. Ct. at 1875.
148. *Id.* at 1881–82.
149. *Id.* at 1882.

the situation when, as in Philadelphia's foster-care system, the religious institution is one among many service providers in a pluralistic sector.

Additional means of protecting institutional freedom while respecting other persons' interests can be available, depending on the particular situation. In the California college dispute, for example, some students at traditionalist religious institutions might not realize their same-sex or transgender orientation until after they begin their college years. But we can reduce the effect on those students without violating the college's religious identity by requiring that the college streamline transfer and credit policies for such students so they can switch to another school as easily as possible.[150] And in the case of the religious group No Más Muertes and its members, who provide food and water to vulnerable unauthorized immigrants,[151] we can protect those life-saving actions of faith while still prohibiting other actions—such as transporting or hiding undocumented entrants—that directly undercut enforcement of the immigration laws.

Conclusion

In virtually every religion, service to people in need is a core aspect of exercising the faith; and in many religions, that includes service to people outside the faith. That fact should weigh heavily in the legal treatment of religious institutions. Constitutional, statutory, and administrative provisions should generously accommodate the freedom of religious institutions to serve others, instead of treating virtually every effect on others as an impermissible "third-party harm." With careful distinctions, based on key factors like the notice of a provider's religious nature and the availability of alternative providers, we can protect religious institutions' vital place in the exercise of religion while also taking account of the rights and interests of others.

150. *See, e.g.*, Alan Noble, *Keeping Faith Without Hurting LGBT Students*, Atlantic (Aug. 15, 2016), https://www.theatlantic.com/politics/archive/2016/08/christian-colleges-lgbt/495815/ (making this suggestion).

151. *See supra* note 5 and accompanying text.